



JON M. HUNTSMAN, JR.  
*Governor*

GARY R. HERBERT  
*Lieutenant Governor*

# State of Utah

## DEPARTMENT OF NATURAL RESOURCES


MICHAEL R. STYLER  
*Executive Director*


### Division of Oil, Gas and Mining

JOHN R. BAZA  
*Division Director*

January 19, 2010

TO: Board of Oil, Gas & Mining

THROUGH: John R. Baza, Director 

FROM: Steve Schneider, Administrative Services & Policy Coordinator 

SUBJECT: Informal Rulemaking for Ownership and Control in Coal Program

This memorandum is written to inform the Board of rulemaking in the Coal Program that has been requested by the Office of Surface Mining ("OSM") pertaining to the subject of "ownership and control." Thus, an informal rulemaking process is appropriate prior to formal rulemaking for the Board's coal rules in Title R645 for this subject.

OSM published the final rule on the topic collectively referred to as ownership and control ("O&C") on December 3, 2007, following prior federal rulemaking in this area on December 19, 2000 and October 28, 1994. The first page of each of these lengthy final rules totaling 203 pages is attached. Because of ongoing litigation, OSM informed Utah and other states to defer state rulemaking. OSM's letter dated October 2, 2009, attached, requested the Division to proceed with rulemaking to be no less effective than the federal regulations. The Division provided a reply letter dated November 24, 2009, attached, with a timetable for rulemaking at the state level.

The Division is currently on schedule with the timetable, which OSM has referred to as ambitious but achievable. Division staff member Priscilla Burton is working part-time on this topic and is making good progress. Like the "valid existing rights" rulemaking topic where the rule changes are being requested by OSM as a result of a lengthy federal rule change, we plan to seek OSM's review of the draft rules prior to future routing to the Informal Rules Review Group.

I will continue to work with the Coal Program staff in the drafting of the O&C rule changes, assuming no objection from the Board. I have also attached an updated flowchart of the primary process for Informal Rulemaking for your information. I will be available to answer questions at the Board briefing on January 27, 2010 or I can be reached at 801-538-5328.

#### Attachments



## DEPARTMENT OF THE INTERIOR

## Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 701, 773, 774, 778, 843, and 847

RIN 1029-AC52

## Ownership and Control; Permit and Application Information; Transfer, Assignment, or Sale of Permit Rights

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final Rule.

**SUMMARY:** We, the Office of Surface Mining Reclamation and Enforcement (OSM), are publishing this final rule to amend certain provisions of our "ownership and control" and related rules, as well as our rules pertaining to the transfer, assignment, or sale of permit rights. More specifically, we are amending our definitions pertaining to ownership, control, and transfer, assignment, or sale of permit rights and our regulatory provisions governing: permit eligibility determinations; improvidently issued permits; ownership or control challenges; post-permit issuance actions and requirements; transfer, assignment, or sale of permit rights; application and permit information; and alternative enforcement. Additionally, we are removing our current rules pertaining to improvidently issued State permits. This final rule implements various provisions of, and is authorized by, the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act).

EFFECTIVE DATE: January 2, 2008.

**FOR FURTHER INFORMATION CONTACT:** Debbie J. Feheley, Chief, Applicant/Violator System Office, Office of Surface Mining Reclamation and Enforcement, Appalachian Region, 2679 Regency Road, Lexington, Kentucky 40503. Telephone: (859) 260-8424 or (800) 643-9748; electronic mail: [dfeheley@osmre.gov](mailto:dfeheley@osmre.gov).

Additional information concerning OSM, this rule, and related documents may be found on OSM's Internet home page (Internet address: <http://www.osmre.gov>) and on our Applicant/Violator System Office's (AVS Office's) Internet home page (Internet address: <http://www.avs.osmre.gov>).

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## I. Background to the Final Rule

This final rule is based on our October 10, 2006, proposed rule (71 FR 59592), in which we proposed to amend certain provisions of our 2000 final ownership and control rule (65 FR 79582) and our rules pertaining to the transfer, assignment, or sale of permit rights at 30 CFR 701.5 (definition of *transfer, assignment, or sale of permit rights*) and 30 CFR 774.17 (regulatory requirements). The 2000 final rule, which took effect for Federal programs (i.e., SMCRA programs for which OSM is the regulatory authority) on January 18, 2001, primarily addresses areas related to ownership or control of surface coal mining operations under section 510(c) of SMCRA. 30 U.S.C.

1260(c). Under section 510(c), an applicant for a permit to conduct surface coal mining and reclamation operations (hereafter "applicant" or "permit applicant") is not eligible to receive a permit if the applicant owns or controls any surface coal mining operation that is in violation of SMCRA or other applicable laws. In addition to implementing section 510(c), the 2000 final rule also addresses, among other things, permit application information requirements, post-permit issuance information requirements, entry of information into the Applicant/Violator System (AVS), application processing procedures, and alternative enforcement. *See generally* 65 FR 79661–79671. Previously, we viewed our transfer, assignment, or sale rules as related to our ownership and control rules because our previous definition of *transfer, assignment, or sale of permit rights* incorporated ownership and control concepts. *See* 30 CFR 701.5 (2007).

Shortly after we promulgated our 2000 final rule, the National Mining Association (NMA) filed a lawsuit in the U.S. District Court for the District of Columbia in which NMA challenged the ownership and control and related provisions of our 2000 final rule on multiple grounds. NMA's suit also included a challenge to our transfer, assignment, or sale rules. Although the 2000 rule did not amend our transfer, assignment, or sale rules, NMA argued that we reopened those rules by proposing to revise them in the proposed rule that preceded the 2000 final rule.

As we explained in our 2006 proposed rule, NMA's lawsuit was another in a series of lawsuits concerning ownership and control and related issues. Litigation in this area—involving, at times, OSM, State regulatory authorities (administering OSM-approved State programs), NMA, and environmental groups—has been contentious and ongoing since at least 1988. The 2000 final rule replaced a 1997 interim final rule (62 FR 19451), which was partially invalidated by the U.S. Court of Appeals for the District of Columbia Circuit. *National Mining Ass'n v. Dep't of the Interior*, 177 F.3d 1 (DC Cir. 1999) (*NMA v. DOI II*). The interim final rule replaced three sets of predecessor regulations dating back to 1988 and 1989 (53 FR 38868, 54 FR 8982, 54 FR 18438), which were invalidated by the D.C. Circuit because the court found that one aspect of the rules was inconsistent with section 510(c) of SMCRA. *National Mining Ass'n v. Dep't of the Interior*, 105 F.3d 691 (DC Cir. 1997) (*NMA v. DOI I*). The

## DEPARTMENT OF THE INTERIOR

## Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 701, 724, 750, 773, 774, 775, 778, 785, 795, 817, 840, 842, 843, 846, 847, 874, 875, 903, 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947

RIN 1029-AB94

**Application and Permit Information Requirements; Permit Eligibility; Definitions of Ownership and Control; the Applicant/Violator System; Alternative Enforcement**

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.  
**ACTION:** Final rule.

**SUMMARY:** We, the Office of Surface Mining Reclamation and Enforcement (OSM), are publishing final rules to amend application and permit information requirements and to redesign permit eligibility criteria under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act), as amended. In this final rule, we are also amending related provisions in our regulations to incorporate changes for internal consistency. This rule fulfills our April 21, 1997, commitment to undertake new rulemaking, including public notice and comment, on ownership and control and related regulatory issues in the wake of the January 31, 1997, decision of the United States Court of Appeals for the District of Columbia Circuit.

This final rule also reflects the findings in another decision of the United States Court of Appeals. On May 28, 1999, the appeals court issued a ruling shortly after the initial close of the comment period for the proposed rule upon which this final rulemaking is based. We later found it advisable to reopen and extend the comment period in order to seek public comment on the effects of the May 1999 decision. As a result, we modified the provisions in this final rule in order to be consistent with the 1999 decision. Thus, this final rule is fully consistent with both court decisions.

**EFFECTIVE DATE:** January 18, 2001.

**FOR FURTHER INFORMATION CONTACT:** Earl D. Bandy, Jr., Office of Surface Mining Reclamation and Enforcement, Applicant/Violator System (AVS) Office, 2679 Regency Road, Lexington, Kentucky 40503. Telephone: (859) 260-8427 or (800) 643-9748. Electronic Mail: [ebandy@osmre.gov](mailto:ebandy@osmre.gov). Additional information concerning OSM, this rule,

and related documents may be found on OSM's Internet home page (Internet address: <http://www.osmre.gov>) and on our AVS Office's Internet home page (Internet address: <http://www.avs.osmre.gov>).

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**I. What Events Precipitated This Rulemaking?**

The National Mining Association (NMA) and the National Wildlife Federation filed suit challenging the validity of three of OSM's rules implementing section 510(c) of SMCRA, 30 U.S.C. 1260(c). These rules are generally known as the 1988 ownership and control rule, the 1989 permit information rules and the 1989 improvidently issued permits rule, which is also referred to as the permit rescission rule. In separate decisions dated August 31, 1995, the U.S. District Court for the District of Columbia upheld the three challenged rules in their entirety. *See National Wildlife Federation v. Babbitt*, Nos. 88-3117, 88-3464, 88-3470 (consolidated) (D.D.C. Aug. 31, 1995); *National Wildlife Federation v. Babbitt*, Nos. 89-1130, 89-1167 (consolidated) (D.D.C. Aug. 31, 1995); *National Wildlife Federation v. Babbitt*, Nos. 89-1751, 89-1811 (consolidated) (D.D.C. Aug. 31, 1995).

NMA appealed the rulings and, on January 31, 1997, the U.S. Court of Appeals for the District of Columbia Circuit reversed the district court's decisions and invalidated the three sets of rules on narrow grounds. *See National Mining Association v. U.S. Department of the Interior*, 105 F.3d 691 (D.C. Cir. 1997) (*NMA v. DOI*). The appeals court held that the clear language of section 510(c) of SMCRA, 30 U.S.C. 1260(c), authorizes regulatory authorities to deny a permit only on the basis of violations of "any surface coal mining operation owned or controlled by the applicant." *NMA v. DOI*, 105 F.3d at 693-94. Because OSM's 1988 ownership and control rule also allowed regulatory authorities to deny a permit on the basis of violations of any person who owned or controlled the applicant, the appeals court invalidated that rule in its entirety. In addition, the court held that because OSM's permit information and permit rescission rules

**FEDERAL REGISTER: 59 FR 54306 (October 28, 1994)**

DEPARTMENT OF THE INTERIOR

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM)

30 CFR Parts 701, 773, 778, 840, and 843

Use of the Applicant/Violator Computer System (AVS) in Surface Coal Mining and Reclamation Permit Approval; Standards and Procedures for Ownership and Control Determinations; Part III

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) establishes new regulations to require regulatory authorities to use OSM's Applicant/Violator Computer System (AVS) and other information sources to identify ownership or control links between permit applicants and violators.

The regulations establish the procedures, standards, and type of proof required to challenge ownership or control links and to disprove violations.

OSM also amends a number of regulations affecting blocking of permits, abatement of notices of violation, improvidently issued permits, and permit application information.

The regulations reduce the possibility of violators receiving and retaining permits in violation of the permit approval provisions of SMCRA. Finally, the rules establish enhanced due process procedures for the regulated community.

EFFECTIVE DATE: November 28, 1994.

ADDRESSES: Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Russell Frum, Acting Chief, Applicant/Violator System Office, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1849 C Street NW., Washington, DC 20240. Telephone: 202-208-4655.

SUPPLEMENTARY INFORMATION:

- I. Background.
- II. Rules Adopted and Responses to Public Comments.
- III. Procedural Matters.

I. BACKGROUND

Section 510(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) and 30 CFR part 773 establish certain requirements for permits and permit processing. These requirements include the identification of ownership or control links between permit applicants and individuals or entities who are responsible for unabated violations of certain Federal or State laws and rules. See 30 CFR 773.5; 30 CFR 773.15(b). The purpose of such inquiry is to determine whether a permit applicant is linked to unabated violations of the Act and related air and water quality requirements. See 30 CFR 773.15(b). In the event that a permit applicant is so linked, the regulatory authority may not issue a permit to the applicant unless the applicant submits proof that the violation has been or is in the process of being corrected to the satisfaction of the agency that has jurisdiction over the violation. In the alternative, the applicant may establish that the violation is the subject of a good faith, direct, administrative or judicial appeal which contests the validity of the violation. *Id.* In the event that a permit applicant is so linked and proof of the violation's correction or good faith appeal is not submitted, issuance of a permit to the applicant may constitute improvident issuance and may subject the permittee to certain remedial measures including suspension or rescission of the permit. See 30 CFR 773.20 and 30 CFR 773.21.



## United States Department of the Interior

OFFICE OF SURFACE MINING  
Reclamation and Enforcement  
P. O. Box 46667  
Denver, Colorado 80201-6667

IN REPLY REFER TO:

02 OCT 2000 (2009)

John R. Baza  
Division of Oil, Gas and Mining  
1594 West North Temple  
P.O. Box 145801  
Salt Lake City, Utah, 84114-5801

Dear Mr. Baza:

On October 28, 1994, December 19, 2000 and December 3, 2007, the Office of Surface Mining Reclamation and Enforcement (OSM) promulgated final rules that adopted or revised certain regulatory definitions and provisions pertaining to review of applications; permit eligibility; application information; applicant, operator, and permittee information; automated information entry and maintenance; permit suspension and rescission; ownership and control findings and challenge procedures; transfer, assignment, or sale of permit rights; and alternative enforcement. The effects of these final rules are found at 30 CFR Parts 701, 773, 774, 778, 840, 843 and 847.

Under 30 CFR 732.17(d), OSM must notify States of all changes in the Act and the Federal regulations that may require a State to modify its regulatory program to remain consistent with all Federal requirements. Pursuant to 30 CFR 732.17(c), OSM also must notify States whenever it determines that such amendments are in fact required.

In compliance with these regulations, OSM has determined that States must amend their programs as necessary to be no less effective than the changes and additions which resulted from promulgation of the Federal regulations pertaining to the above-listed regulatory subject matter. The enclosed Narrative of Major Rule Changes provides a description of potentially required Utah amendments; the full *Federal Register* text and preamble should be consulted when developing the precise language of the State amendments. The enclosed Narrative also identifies the counterpart State rule citation, if one exists. Following your review of the Narrative, we will be glad to discuss how these rule changes affect your program.

Also enclosed are the following published final *Federal Register* notices for the three Federal final rulemaking actions pertinent to these regulatory subjects.

- (1) Ownership and Control; Permit and Application Information; Transfer, Assignment, or Sale of Permit rights – published December 3, 2007 (72 FR 68000) and referred to hereafter as the 2007 rule.

- (2) Application and Permit Information Requirements; Permit Eligibility; Definitions of Ownership and Control; the AVS; Alternative Enforcement – published December 19, 2000 (65 FR 79582) and referred to hereafter as the 2000 rule.
- (3) Use of the AVS in Surface Coal Mining and Reclamation Permit Approval; Standards and Procedures for Ownership and Control Determinations – published on October 28, 1994 (59 FR 54306) and referred to hereafter as the 1994 Procedures rule.

Previously we provided your staff a detailed side-by-side comparison of the Utah and Federal regulations pertaining to ownership and control.

In accordance with 30 CFR 732.17(f)(1), I am requesting that, within 60 days of this letter, you submit either proposed written amendments or a description of amendments to be proposed in response to the revised Federal regulations, and a timetable for enactment. The timetable should include the dates by which you intend to submit the amendments and a schedule for the State legislative and rule making procedures. As always, if you believe no amendment is necessary in a specific instance, please so advise and OSM will consider any rationale you wish to submit.

Utah's program revisions will supersede the March 21, 1991 Memorandum of Understanding between OSM and Utah concerning Utah's use of OSM's nationwide applicant/violator computerized data system.

Please note that OSM sent Utah two 30 CFR Part 732 letters concerning ownership and control dated May 11, 1989, and January 13, 1997. Because of ongoing litigation, OSM advised States to delay their response to these letters until all litigation was completed. DOGM responded to OSM's May 11, 1989 732 letter on July 3, 1990. Changes proposed at that time were approved on August 23, 1991 (56 FR 41795). Additional changes have been made to the Federal Program since that time. This letter concerning ownership and control amendments replaces those earlier 30 CFR Part 732 letters.

DOGM does not have any other outstanding required amendments pertaining to Ownership and Control at this time. Such required amendments would be codified under 30 CFR 944.16.

Please address all submittals to James F. Fulton. Any questions or requests for assistance also should be directed to James F. Fulton at (303) 293-5015 or [jfulton@OSMRE.gov](mailto:jfulton@OSMRE.gov).

We look forward to working with you on this effort.

Sincerely,



Allen D. Klein  
Regional Director  
Western Region

Enclosures



GARY R. HERBERT  
Governor

GREGORY S. BELL  
Lieutenant Governor

# State of Utah

## DEPARTMENT OF NATURAL RESOURCES

MICHAEL R. STYLER  
Executive Director

### Division of Oil, Gas and Mining

JOHN R. BAZA  
Division Director

November 24, 2009

James Fulton  
Office of Surface Mining  
PO Box 46667  
Denver, CO 80201

Re: Response to October 2, 2009 Letter on "Ownership and Control" for Coal Program

Dear Mr. Fulton:

This letter is written in response to the October 2, 2009 letter from Allen Klein concerning "ownership and control" regulations pertaining to the Coal Regulatory Program. In response to OSM's request for a plan for rule amendments in response to the revised federal regulations, the following proposed timetable by our Division is provided:

#### Action

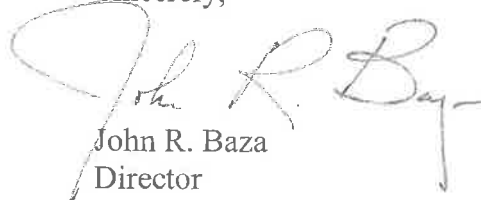
Staff commence drafting of rule amendments  
Staff present topic for informal process at Board Briefing  
Staff continue rule drafts and informal reviews with OSM  
Update Board and distribute informally for comment  
Complete informal rulemaking process  
Conduct formal rulemaking process with Board  
Submit formal program amendment to OSM

#### Dates

Dec. 1 - Jan. 26, 2010  
January 27, 2010  
Jan. 27 - June 30, 2010  
July 28, 2010  
October 31, 2010  
Nov. 1 - Feb. 28, 2011  
April 15, 2011

The Division will strive to meet this timetable, but we recognize that requests for additional time by parties to further analyze and comment could also occur. If there are any questions, please contact Steve Schneider at [steveschneider@utah.gov](mailto:steveschneider@utah.gov) or 801-538-5328.

Sincerely,



John R. Baza  
Director

JRB/SLS/mtb  
cc: Dana Dean  
Daron Haddock





## OG&M INFORMAL RULEMAKING

